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SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-460

CLAY L. SHAW,

Respondent-
Appellee Below

versus

JIM GARRISON,

Petitioner-
Appellant Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit, affirming an order of the District Court for the Eastern District of Louisiana, granting an injunction against the State's prosecution of respondent for perjury while testifying in a prior trial for conspiracy to assassinate the President of the United States.

I — OPINIONS BELOW

The opinion of the District Court was rendered on May 27, 1971, and is reported at 328 FS 390. The opinion of the Court of Appeals is not yet reported. Both opinions are reproduced in the Appendix.

II — JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on July 31, 1972. No petition for rehearing was filed. Jurisdiction of this Court lies under 28 USC 1254.

III — QUESTIONS PRESENTED

1 - Whether the guidelines set forth by this Court in *Mitchum vs Foster*, 407 US 225 (1972), permit a federal court to enjoin the prosecution of a pending state court criminal action, instituted some two years before respondent asked the federal court to interfere with the state's prosecution not undertaken in bad faith without hope of obtaining a valid conviction, and which can not be said to result in great or "immediate" irreparable injury.

2 - Whether a federal court may enjoin a pending State criminal prosecution for perjury, when the State statute does not regulate expression itself, is not patently unconstitutional on its face, the prosecution does not have any chilling effect on plaintiff's First Amendment rights [*Dombrowski vs Pfister*, 280 US 479 (1955)], and does not constitute great or "immediate" irreparable injury [*Younger vs Harris*, 401 US 37 (1971)].

The Court of Appeals' affirmative answer to the first

of these questions is in derogation of the underlying premise on which the decision of this Court in *Mitchum vs Foster*, 407 US 225 (1972) was based; and requires that this Court further delineate the extent of its holding in that case, that it did "not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding", and that an injunction may be granted only when "essential to prevent great, immediate and irreparable loss of a person's constitutional rights" (407 US at p. 243).

The Court of Appeals' affirmative answer to the second question is in direct conflict with the holdings of this Court in *Dombrowski vs Pfister*, 280 US 479 (1955), in *Younger vs Harris*, 401 US 37 (1971) and *Perez vs Ledesma*, 401 US 82 (1971).

It would seem to be appropriate—through the medium of this important case—for this Court to put to rest the vexatious problem as to the right of the Federal courts to enjoin state-court criminal prosecutions.

IV — STATUTES INVOLVED

28 USC 2283:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

42 USC 1983:

> "Every person who, under color of any statute,

ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

LRS 14:123:

"Perjury is the intentional making of a false written or oral statement in, or for use in, a judicial proceeding, or any proceeding before a board or official, wherein such board or official is authorized to take testimony. In order to constitute perjury the false statement must be made under sanction of an oath or an equivalent affirmation, and must relate to matter material to the issue or question in controversy.

"It is a necessary element of the offense that the accused knew the statement to be false; but an unqualified statement of that which one does not know or definitely believe to be true is equivalent to a statement of that which he knows to be false."

V — STATEMENT OF THE CASE

After respondent's earlier attempt to have the Federal courts interfere with his prosecution by the State of Louisiana was rejected [393 US 220], respondent was tried for having conspired in New Orleans to assassinate President Kennedy, and was acquitted by a jury.

In the course of that trial, respondent took the witness stand and is alleged to have committed perjury, when

he denied ever having known either David Ferrie or Lee Harvey Oswald, for which petitioner, the District Attorney for the Parish of Orleans, charged him under LRS 14:123, the applicable statute.

Some two years after the charge of perjury had been filed against him, on the very day on which he was to be tried in the State court, respondent, invoking the jurisdiction of the Federal court, relying on 28 USC 1343(3)-(4), 42 USC 1983 and 1985 (the Civil Rights Act), filed this action, seeking the intervention of the Federal Court to enjoin his prosecution, apparently attempting to bring this case within the ambit of *Dombrowski vs Pfister*, 380 US 479 (1965).

The District Court found that the proceeding against respondent for conspiracy to assassinate President Kennedy and the perjury charge were brought in bad faith, and issued a permanent injunction on the ground that "such bad faith constitutes irreparable injury which is great and immediate", because if respondent "is forced to stand trial for perjury, takes the stand and is acquitted, this court has no doubt that plaintiff will be charged anew on the basis of statements made by him from the witness stand" (328 FS at p. 403).

In the injunction proceeding below, petitioner filed a list of ten key witnesses—four of whom had not testified during the conspiracy trial—whom he intends to call at the trial of the perjury charge, together with a brief statement as to what the testimony of each is expected to be, which testimony would clearly be sufficient to warrant "a valid conviction" by a jury. *Perez vs Ledesma*, 401 US 82, 85 (1971).

On appeal, the Court of Appeals relied almost exclusively on, and quoted extensively from, the opinion of the District Court*; and affirmed the issuance of the injunction, for the stated reason "that it is unnecessary to go beyond the bad faith nature of the perjury prosecution to affirm the judgment" (Slip. Opin., pp. 3-4).

In holding that the sole "finding of a bad faith prosecution establishes irreparable injury both great and immediate for purposes of the comity restraints discussed in *Younger*" (Slip Opin., p. 21), the Court of Appeals misconstrued this Court's opinion in *Younger vs Harris*.

VI — REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Further Delineation of This Court's Holding in Mitchum vs Foster is Required

In the very recent case of *Mitchum vs Foster*, 407 US 225 (June 19, 1972), this Court held that § 1983 of the Civil Rights Act is an express Congressional authorization for injunction, within the meaning of the exception to the federal anti-injunction statute (28 USC 2283); but the Court did "not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding" (407 US at p. 243).

The Court again recognized that such an injunction may be granted only in those rare circumstances when

* The cavalier attitude, and lack of independent thought on the part, of the Court of Appeals, in preparing its opinion, is evidenced by its statement (Slip Opin., p. 14) that "Russo, asserting his Fifth Amendment privilege, declined to answer any questions when put on the stand in the perjury trial". Obviously there has not yet been any perjury trial.

it is "essential to prevent great, immediate, and irreparable loss of a person's constitutional rights" (407 US at p. 243).

This case really does not involve civil rights. There is no question of free speech involved here, as there was in *Dombrowski vs Pfister*, 380 US 479 (1955). Nor is there "some racial, or perhaps otherwise class-bred, invidiously discriminatory animus" [*Griffin vs Breckenridge*, 403 US 88, 101-101 (1971)], behind the state's perjury prosecution sought to be enjoined.

It is well settled that one may be prosecuted for perjury committed while testifying in his own behalf in a prior proceeding. *United States vs Williams*, 341 US 58, 62 (1951). The jury may well have believed that respondent knew Ferrie or Oswald, and still have acquitted him on the charge of conspiracy: "In this situation, the authorities dealing directly with perjury prosecutions clearly hold that when the fact is not *necessarily* determined in the former trial, the possibility that it may have been does not prevent reexamination of that issue." *Adams vs United States*, 287 F2d 701 (CA 5-1961).

There is, in this case, no "threat to the plaintiff's federally protected rights . . . that cannot be eliminated by his defense against a single criminal prosecution". *Younger vs Harris*, 401 US 37 (1971), at p. 46. Moreover, this case cannot be said to be one "undertaken by state officials in bad faith without hope of obtaining a valid conviction". *Mitchum vs Foster*, 407 US 225 (1972), quoting *Perez vs Ledesma*, 401 US 82 (1971), at p. 85.

Certiorari should be granted to permit this Court to delineate the extent of its holding in *Mitchum vs Foster*, that while a civil rights action for injunction of a state court criminal proceeding, is not precluded by the federal anti-injunction statute, it should be viewed in light of "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding" (407 US at p. 243).

-b-

Conflict with This Court's Opinion in Younger vs Harris

In *Younger vs Harris*, 401 US 37, at p. 43 (1971), this Court recognized that "since the beginning of this Country's history, Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts"; that "during all this lapse of years from 1793 to 1970 the statutory exceptions . . . have been only three", as set forth in 28 USC 2283; and that a judicial exception "has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in a state court is not enjoined, suffer irreparable damages".

In that case, Justice Black emphasized that there must not only be "the traditional prerequisite" of irreparable injury, but that, "in addition . . . even irreparable injury is insufficient unless it is 'both great and immediate'" (401 US at p. 46).

Respondent did not initiate his action seeking to enjoin the State Court proceeding against him for perjury, until some two years after the charge of perjury was

filed against him by petitioner, and on the very day that his trial for perjury was to commence in the State court. Such belated action cannot conceivably be predicated on both great and "immediate" irreparable injury.

Much emphasis has been placed by respondent on the asserted bad faith of the District Attorney in bringing respondent to trial for having conspired in New Orleans to assassinate President Kennedy. But the facts stand undisputed that the District Attorney proceeded with that trial only after (1) a three-judge State court had held that there was probable cause for respondent to be brought to trial; (2) after a Grand Jury had indicted him for such conspiracy; and (3) after this Court had affirmed his right to do so. *Shaw vs Garrison*, 393 US 220 (1968).

In any event, it is not that trial which respondent is now asking the federal courts to enjoin, but the subsequent and distinct prosecution brought against him for having committed perjury while testifying in the prior trial.

Even should respondent take the stand in his defense of the perjury charges, and reiterate his prior testimony denying having known Ferrie and Oswald, and be acquitted by the jury, respondent could not, under the doctrine of double jeopardy or res adjudicata, be subject to another charge of perjury. *Commonwealth vs Spivey*, 243 Ky. 483 (1932).

It is accordingly submitted that the holding of the Court of Appeals, affirming the permanent injunction against respondent's prosecution in the State court for

perjury, is in contravention of the holdings of this Court both in *Dombrowski vs Pfister* and *Younger vs Harris;* and this Court should take jurisdiction of this case to review the holding below which, if allowed to stand, would serve to destroy the well-recognized public policy against Federal intervention in State criminal prosecutions.

VII — CONCLUSION

Certiorari should be granted to enable this Court to set a limit to the exception to "the notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the State and their institutions are left free to perform their separate functions in their separate ways". *Younger vs Harris*, 401 US at pp. 43-44.

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and

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September, 1972

CERTIFICATE

It is certified that copies of the foregoing petition were served on respondent this date by mailing same to his counsel of record as required by Rule 33-1 of this Court.

New Orleans, September ____, 1972.

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2422

CLAY L. SHAW,
Plaintiff-Appellee,

versus

JIM GARRISON, Individually, and as District Attorney for the Parish of Orleans, State of Louisiana,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(July 31, 1972)

Before WISDOM, GODBOLD, and RONEY, Circuit Judges.

WISDOM, Circuit Judge: In this case the district court found that Jim Garrison, District Attorney for the Parish of Orleans, Louisiana, in bad faith and for purposes of harassment brought a criminal prosecution for perjury against Clay Shaw. 328 F.Supp. 390 (1971). The court found that the prosecution would

cause great and irreparable injury to Shaw and enjoined the district attorney and his staff "from further prosecution of the pending criminal action". 328 F. Supp. at 400. We affirm: the findings were not clearly erroneous; they meet the "special circumstances" requirements of *Younger v. Harris*, 1971, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669.

The district court held also that Title 42 U.S.C. §1983 was an express exception to the anti-injunction statute, 28 U.S.C. §2283. The Supreme Court has now confirmed the correctness of this view. *Mitchum v. Foster*, June 19, 1972, 40 L.W. 4737.

I. The Facts

Clay Shaw was active in business and civic affairs in New Orleans and for twenty years was Managing Director of the International Trade Mart, an organization for the promotion of business and cultural activities between New Orleans and foreign countries. The prosecution for perjury grew out of the State's unsuccessful attempt to convict Shaw of conspiracy to assassinate President John F. Kennedy. The State charged that Shaw, who took the stand in his own defense, perjured himself when he denied having known either Lee Harvey Oswald or David Ferrie, the alleged co-conspirators in the assassination plot. The plaintiff relies, in part, on the fear of multiple prosecutions, that is, the first was for conspiracy to assassinate President Kennedy; the second was for perjury; a third and fourth may be in store for him. The district court

agreed with the plaintiff.[1] Based on the facts showing the district attorney's relentless harassment of Shaw, the trial judge could fairly infer that Shaw ran the risk of additional prosecutions. We feel, however, that it is unnecessary to go beyond the bad faith nature

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[1]The district court found:

> This court is not dealing with a single good faith criminal prosecution wherein allegations of unconstitutional procedures are made. This court is dealing with a case of continuing harassment and multiple prosecutions, with the likelihood that such harassment and prosecution will continue in the future, unless abated by direct federal court intervention. Herein lies the unique nature of this case and the resulting impotency of traditional avenues of relief. If plaintiff is forced to stand trial for perjury, takes the stand and is acquitted, this court has no doubt but that plaintiff will be charged anew on the basis of statements made by him from the witness stand. A request for relief in this subsequent prosecution would be met with the same arguments put forth by the defendant in the instant proceeding and so on *ad infinitum*. Surely at some point plaintiff's precious constitutional rights must be vindicated. 328 F. Supp. at 403.

Shaw testified:

> Originally when I was charged, as you know, you, as my attorney, counseled me that I need not take the stand and that no inference would be drawn from the fact that I did not take the stand, but I knew I was not guilty of this charge, so I did take the stand, and then of course I was found not guilty, and then I found myself facing perjury charges arising out of my testimony given at the conspiracy trial. If I had not taken the stand, I would not be charged with perjury today, yet I took the stand in my own defense because I knew I was innocent.
>
> Yet I was charged with perjury because of the very truthful testimony that I gave, and I see no reason to believe that if I take the stand in the new proceedings in my own defense and testify again truthfully as I did in the conspiracy trial the District Attorney will not have me reindicted for perjury for this testimony that I will give.

of the perjury prosecution to affirm the judgment. In reaching that conclusion we cannot ignore the first prosecution; that prosecution is an inseparable part of the factual context within which the second prosecution should be considered. The perjury charge was based on Shaw's testimony in the conspiracy trial. Garrison's theory of the assassination and the trial itself were widely publicized. Whatever ambitions he may have had as the man who solved the Kennedy assassination crumbled to bits when the jury came in with a verdict of "not guilty".

On November 22, 1963, President John F. Kennedy was assassinated. Less than forty-eight hours later, Jack Ruby shot and killed the accused assassin, Lee Harvey Oswald. Oswald had spent the summer of 1963 in New Orleans. Learning of this, the district attorney for Orleans Parish conducted an investigation of Oswald's activities in New Orleans. As a result of this investigation, David Ferrie, allegedly an acquaintance of Oswald's, was arrested and turned over to the F.B.I. for questioning.[2] Ferrie died in February, 1967.

Not until November 1966 did Garrison resume his investigation of the Kennedy assassination. The resumption apparently was triggered by the release of the Warren Commission's report on the assassination. Garrison testified at the hearing below that "the Federal Government had not been looking into it [the assassination] honestly, and that it had been a fake investigation..."

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[2] In his book, Heritage of Stone, an exhibit, Garrison states that his office had been informed that Oswald and Ferrie were "associated together in the Civil Air Patrol" in New Orleans.

Garrison first interviewed Shaw in connection with the investigation in December 1966. In his testimony in the district court Garrison offered no explanation for the initial interrogation of Shaw. On March 1, 1967, Shaw was arrested and charged with conspiracy to assassinate President Kennedy.

At the time of Shaw's arrest, according to James L. Alcock, Garrison's chief prosecuting attorney, the State's only witness against Shaw was Perry Raymond Russo. Garrison learned about Russo, and found him in Baton Rouge, Louisiana, as the result of a newspaper article in which Russo was quoted as having made several statements concerning David Ferrie. After Assistant District Attorney Sciambra interviewed Russo in Baton Rouge, Garrison had Russo brought to New Orleans where he was given sodium pentothal, subjected to hypnosis, and again interrogated. Two days later, Shaw was arrested.

On March 1, 1969, a unanimous state court jury, after fifty-five minutes of deliberation, found Shaw not guilty of the charge that he conspired to assassinate President Kennedy. The verdict culminated a forty-day trial. On March 3, 1969, the next working day, Garrison, signed an information charging Shaw with the crime of perjury. The information charged that Shaw perjured himself when, in testimony at the conspiracy trial, he denied having known David Ferrie or Lee Harvey Oswald.

II. The Proceedings Below

On January 18, 1971, the date of the state court perjury trial, Shaw applied to the United States District

Court for the Eastern District of Louisiana for a temporary restraining order enjoining Garrison from prosecuting the perjury charge. Shaw invoked jurisdiction under 28 U.S.C. §§ 1343(3) and 1343(4) for a cause of action based on 42 U.S.C. §§1983 and 1985 and "under the Constitution of the United States". Shaw alleged that he suffered and will continue to suffer "grave and irreparable injury" as the result of the state perjury prosecution brought in "bad faith" and "in furtherance of Garrison's scheme of harassment and intimidation of [Shaw]". The district court refused to issue a temporary restraining order, and Shaw applied to this Court for emergency relief. This Court ordered the district court to hold a hearing on Shaw's request for injunctive relief. Meanwhile, the state case was continued until January 20, 1971. On remand, the district court issued a temporary restraining order pending a hearing on the preliminary injunction set for January 25, 1971.

The hearing lasted three days. The district court received fifty-five exhibits and heard eighteen witnesses on behalf of Shaw. Garrison offered no proof.[3]

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[3]As to Garrison's failure to offer proof, the district court said:

> The burden of proof is, of course, upon the plaintiff Shaw to prove by a preponderance of the evidence the existence of exceptional and unusual circumstances that would justify this court's intervention. When the plaintiff's evidence constitutes a prima facie case, the burden is on the defendant of going forward with any evidence to rebut the plaintiff's case .... In this case the defendant Garrison offered no proof, apparently relying on the supposed inability of Shaw to sustain his burden and that even if Shaw did, he would not be entitled to any relief by this Court. In those instances where the plaintiff proved certain facts by a

III. The Ruling Below

On May 27, 1971, the district court issued a permanent injunction "restraining Jim Garrison, District Attorney for the Parish of Orleans, his assistants, employees, agents and all persons in active concert and participation with him from further prosecution of the pending criminal action entitled "State of Louisiana v. Clay L. Shaw, No. 208-260". 328 F. Supp. at 404. In a thoroughly considered opinion the experienced district judge made detailed findings of fact and conclusions of law. Characterizing the facts as "unique and bizarre", the court held: "[T]he perjury charge was brought in bad faith and for purposes of harassment ... such bad faith constitutes irreparable injury which is great and immediate". 328 F. Supp. at 400. Thus, the court concluded that the "'special circumstances' requirements of Younger"[4] were met and that Shaw was entitled to relief. 328 F. Supp. at 393.

The district court based its findings of bad faith and harassment on the history of Garrison's pursuit of Shaw, including the events leading to the state conspiracy trial as well as the events incident to the state

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preponderance of the credible evidence, and the defendant failed to rebut those facts either on cross-examination or by offering contrary evidence, this court has accepted those facts as true. (emphasis added.) 328 F. Supp. at 393.

[4] Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971); Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Byrne v. Karalexis, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 782 (1971); Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); Dyson v. Stein, 1971, 401 U.S. 200, 91 S.Ct. 761, 27 L.Ed.2d 781.

perjury prosecution. As to Garrison's prosecution of Shaw for conspiracy, the district court found bad faith and harassment on the following facts:

(1) The court found a "serious question concerning the basis for Garrison's decision" to investigate the assassination of President Kennedy.

> Apparently, his jurisdiction was based on Oswald's activities in New Orleans in the summer of 1963. However, it is strange indeed that, nearly there years after the assassination, Garrison would decide to undertake an investigation of such gravity merely because he disagreed with the findings of the Warren Commission and Oswald had spent some time in New Orleans.

328 F. Supp. at 394. William A. Gurvich, an experienced investigator and Executive Director of an established detective agency in New Orleans, testified that Garrison solicited his help in conducting the investigation. He worked on this project for about six months. Gurvich testified that he resigned because he believed the investigation to be a "fraudulent, criminal act".

(2) There was no basis for Garrison's initial interrogation of Shaw. "Just how [Shaw] ... was first selected to be interviewed by [Garrison] ... when he was not a suspect is another unanswered question in this case. [Garrison] . . . offered no evidence to show any basis or cause for his office's interrogation of [Shaw] ... concerning such a shocking crime". 328 F. Supp. at 394.

(3) The extreme measures the state resorted to in extracting information from Perry Raymond Russo and the use of his testimony at the trial were incompatible with the American System of Justice. Russo was given sodium pentothal and subjected to hypnosis to "obtain a degree of corroboration" of what Russo had allegedly related to Garrison's assistant about a conspiratorial meeting. Yet the report of Garrison's assistant, Sciambra, who interviewed Russo, made no mention of any conspiratorial meeting involving Shaw. The district court stated:

> It should be borne in mind that the memorandum which [Garrison's assistant] ... wrote on his return from Baton Rouge did not mention any such meeting . . . [S]ubstantial doubts are raised regarding the validity and objectivity of the state's case when a prosecuting attorney resorts to the use of such extraordinary tactics as were employed by Garrison on Russo. A fair inference to be drawn is that these *ex parte* procedures were used to implant into Russo's mind a story implicating the plaintiff in an alleged conspiracy plot. This could have been accomplished by post-hypnotic suggestion. This inference is supported by the fact that Garrison immediately moved to arrest and charge Shaw based solely on Russo's questionable, vague story. Such hasty action on the part of the defendant without submitting the matter, at that time, to the grand jury demonstrates ulterior motives.

328 F. Supp. at 395. Russo's testimony at trial was significantly different from the testimony he gave at the preliminary hearing. For instance, at the preliminary hearing Russo stated unequivocally that Shaw was present at a conspiratorial meeting; in the trial Russo was unable to identify Shaw as having been present at the alleged meeting.[8] In the perjury trial Russo invoked his Fifth Amendment privilege when asked the precise questions he had previously answered in state court proceedings. The district court concluded:

> Normally no inference can be drawn when one invokes a right secured to him by the Con-

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[8] Lieutenant O'Donnell a member of the New Orleans Police Department for nineteen years testified that he attempted to give Russo a lie detector test . . .

> . . . It was not successful. However, O'Donnell stated he took the machine's attachment from Russo's body and continued on with the interview. According to O'Donnell, Russo told him that he did not know if Shaw was at David Ferrie's apartment the night of the alleged meeting to plot the assassination. Russo stated that if he were pressed for an answer, he would have to say that Shaw was not present. He further stated to O'Donnell that "he was under a great deal of pressure and that he was sorry that he ever got involved in this mess". O'Donnell testified that he gave Garrison both an oral and written account of his interview with Russo. The written account filed into evidence in this case by the Plaintiff. O'Donnell said Garrison became enraged when he made his report and insinuated that O'Donnell had "sold out to the press or * * * to someone".
>
> The defendant Garrison did not make available to the plaintiff's counsel the report of Lt. O'Donnell. Instead, he withheld it despite the fact that its subject matter pertained directly to statements that were pertinent to the credibility of Russo, the only witness upon whose story Shaw had been arrested.

328 F. Supp. at 395-6.

stitution. However, in the circumstances of this case the court believes that it can and it does draw the narrow inference from Russo's action, that even today, he at least has substantial doubts as to the truthfulness of the testimony he gave in state court.

328 F. Supp. at 396.

(4) Garrison used funds received from private sources to pursue his investigation of Shaw. A group known as "Truth or Consequences" was formed in February 1967 to solicit and contribute funds to Garrison's investigation. "The evidence is overwhelming that these funds were used in preparation for Shaw's conspiracy trial". 328 F. Supp. at 397. The group, all friends of Garrison, made it clear that they expected results. Garrison gave them results in the form of the prosecution of Clay Shaw — for conspiracy and for perjury.

(5) The manner of Shaw's arrest is described by the district court as follows:

> Garrison carefully set the stage for Shaw's arrest, which took place at approximately 5:30 P.M. four and a half hours after Shaw voluntarily appeared in Garrison's office. During this time, a representative of Life Magazine photographed Shaw through a two-way mirror unbeknownst to him. The hallway outside the defendant's office on the second floor of the New Orleans Criminal Courts Building had mysteriously become congested with news-

> men, photographers, television camera crews, and members of the general public. Shaw was led handcuffed into the hallway, where he was shoved and pushed through the crowd to reach an elevator leading to the basement of the building and then to Central Lockup. All of this appeared on television. Shaw could have been taken down in a private elevator located in Garrison's office, but this would not have afforded the publicity Garrison was obviously seeking. Shaw's arrest and the manner in which it was effected was outrageous and inexcusable. The only conclusion that can be drawn from Garrison's actions is that he intentionally used the arrest for his own purposes, with complete disregard for the rights of Clay Shaw.

328 F. Supp. at 399.

(6) Garrison's pretrial conduct showed a "total disregard of Shaw's rights". 328 F. Supp. at 399. He held press conferences and issued press releases during the pretrial period. Garrison even released information to the press that he had refused to give to Shaw. "[T]he action of Garrison in releasing information to the press while denying it to Shaw clearly reveals that ... [Garrison] was not prosecuting Shaw in good faith". 328 F. Supp. at 399.

The district court also found bad faith and harassment in the events relating to the perjury prosecution.

(1) No witness who testified at the hearing before the district court, including Garrison, could recall an instance where a defendant *who took the stand* and was acquitted was later charged with perjury.

(2) No perjury charges were filed against State witnesses although their testimony at the conspiracy trial contradicted their testimony previously given.

(3) The chief prosecuting attorney at the state conspiracy trial testified that "at the time the perjury charge was filed there were no witnesses available other than those who were available at the conspiracy trial". 328 F. Supp. at 400.

(4) Garrison has a "significant financial interest in the continued prosecution of Clay Shaw":

> Garrison's book, Heritage of Stone, concerns his investigation of President Kennedy's assassination. Defendant also has a contract to write three additional books. It is obvious that the sale of defendant's book may be promoted by the publicity resulting from the continued prosecution of Clay Shaw. It provides a means whereby defendant himself may profit, and also repay the substantial obligations owed to one of his financial backers. The court finds that this desire for financial gain is among the motives which prompt the continued prosecution of Clay Shaw.

328 F. Supp. at 400.

The State's case against Shaw for conspiracy to assassinate President Kennedy turned on the testimony of Perry Russo. No one knew better than Garrison how unreliable Russo was. If he had ever any faith in Russo's credibility, it must have vanished when he heard Russo testify. Russo was equally important in the State's case against Shaw for perjury. And any hope of winning that case vanished when Russo, asserting his Fifth Amendment privilege, declined to answer any questions when put on the stand in the perjury trial. In view of the extreme lengths Garrison went in the first place to "persuade" Russo to corroborate the alleged conspiracy theory, it is a fair inference that he knew Russo would be as ineffective in the second trial as he was in the first. Moreover, considering also the extreme lengths to which Garrison went for the purpose of "proving" his case, it is a fair inference that he well knew that Russo would take the Fifth.

IV. Younger v. Harris: Comity Restraint on Injunctions Against Pending State Criminal Prosecutions.

Younger v. Harris and its companion cases define the contours of the "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances". 401 U.S. at 41.[6] As this Court has previously noted,

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[6] This underlying reason for restraining courts of equity from interfering with criminal prosecution is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state govern-

> Younger and its accompanying opinions, while significant, do not represent startling new doctrines with respect to the proper role of a federal court in our system of federalism ...
>
> The opinion does not purport to extend beyond this traditional realm of comity and require across-the-board abdication of federal decision making power in all manner of cases.

Hobbs v. Thompson, 5 Cir. 1971, 488 F.2d 456, 465. In *Younger*, the Supreme Court defined the prerequisites — "special circumstances" — which must be present

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ments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism", and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism". The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism", born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

401 U.S. at 44-45.

before a federal court will issue an injunction against a pending state criminal proceeding. Reviewing the prior cases, the Court concluded:

> In all of these cases the Court stressed the importance of showing irreparable injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is "both great and immediate".

401 U.S. at 46.

In the present case we are asked to clarify the meaning of "irreparable injury". Shaw argues that a showing of bad faith prosecution or prosecution for the purpose of harassment establishes the requisite irreparable injury. Garrison, on the other hand, contends that a showing of bad faith or harassment is insufficient; he argues that irreparable injury must be independently established. We hold, as the language of *Younger* makes clear, that a showing of bad faith or harassment is equivalent to a showing of irreparable injury for purposes of the comity restraints defined in *Younger*, because there is a federal right to be free from bad faith prosecutions.[7] Irreparable injury need not be independently established.

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[7]Irreparable injury is not merely inferred; irreparable injury for the purposes of *Younger* is conclusively shown by a showing of bad faith or harassment.

In *Younger*, the Court repeatedly spoke of "good faith" and "bad faith" prosecution in such a manner as to indicate that a showing of bad faith was sufficient, although not necessary,* to establish irreparable injury. Quoting from *Watson v. Buck*, 1941, 313 U.S. 387, 400, 61 S.Ct. 962, 85 L.Ed. 1416, 1423, citing *Beal v. Missouri Pacific Railroad Corp.*, 1941, 312 U.S. 45, 61 S.Ct. 418, 85 L.Ed. 577, 579, the Court said, "'No citizen or member of the community is immune from prosecution, *in good faith*, for his alleged criminal

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*There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment. For example, as long ago as the *Buck* case, *supra*, [Watson v. Buck, 1941, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416] we indicated:

> 'It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it.'
> 313 U.S. at 402, 61 S.Ct. 962.

Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be.
401 U.S. at 53. See also Younger v. Harris, *supra*, 401 U.S. at 54 (Stewart J., with whom Harlan, J. joined, concurring).

> Bad faith harassment can, of course, take many forms, including arrests and prosecutions under valid statutes where there is no reasonable hope of obtaining conviction, see e.g., Cameron v. Johnson, supra, [390 U.S.] at 621 [88 S.Ct. at 1340, 20 L.Ed.2d 182], and a pattern of discriminatory enforcement designed to inhibit the exercise of federal rights, *see*, e.g., Bailey v. Patterson, 323 F.2d 201 (CA 5 1963)".

Perez v. Ledesma, *supra*, 401 U.S. at 118 (Brennan, J., with whom White, J. and Marshall, J. joined, concurring in part and dissenting in part). In Dyson v. Stein, the Court stressed that the existence of such irreparable injury was a matter to be determined carefully under the facts of each case. 401 U.S. at 203.

acts'." 401 U.S. at 46 (emphasis supplied). Similarly, quoting from *Douglas v. City of Jeannette*, 1943, 319 U.S. 157, 164, 63 S.Ct. 877, 87 L.Ed. 1324, 1330, the Court stated, " 'It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and *in good faith* ...' " 401 U.S. at 47 (emphasis supplied). Also, in speaking of *Dombrowski v. Pfister*, 1965, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22, the Court said that the circumstances presented in that case "as viewed by the Court sufficiently establish the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought *in good faith*, that had always been considered sufficient to justify federal intervention". 401 U.S. at 48 (emphasis supplied).

> The District Court, however, thought that the Dombrowski decision substantially broadened the availability of injunctions against state criminal prosecutions and that under that decision the federal courts may give equitable relief, without regard to any showing of *bad faith or harassment*, whenever a state statute is found "on its face" to be vague or overly broad, in violation of the First Amendment.

401 U.S. at 40 (emphasis supplied).*

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*Speaking of Cameron v. Johnson, 1968, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182, the Court said:

> [A] divided Court denied an injunction after finding that the record did not establish the necessary bad faith and harassment; the dissenting Justices themselves stressed the very limited role to be allowed

More importantly, in its discussion of the facts of the *Younger* case, the Court made clear the sufficiency of a finding of bad faith or harassment:

> There is no suggestion that this single prosecution against Harris is brought in *bad faith* or is only one of a series of repeated prosecutions to which he will be subjected ... There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of *bad faith and harassment*. ... Harris has failed to make any showing of *bad faith, harassment, or any other unusual circumstance that would call for equitable relief.*

401 U.S. at 49-54 (emphasis supplied). Mr. Justice Stewart, joined by Mr. Justice Harlan, concurred, stating, "A threat of this nature [irreparable injury both great and immediate] might be shown ... if there has been bad faith and harassment — official lawlessness — in a statute's enforcement ..." 401 U.S. at 56. Similarly, Mr. Justice Brennan, joined by Mr. Justice White and Mr. Justice Marshall, concurred in the result because Harris "has not alleged that the prosecution was brought in bad faith to harass him". 401 U.S. 56. Finally, Mr. Justice Douglas in dissent stated:

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for federal injunctions against state criminal prosecutions and differed with the Court only on the question whether the particular facts of that case were sufficient to show that the prosecution was brought in bad faith.

401 U.S. at 49.

The special circumstances when federal intervention in a state criminal proceeding is permissible are not restricted to bad faith on the part of state officials or the threat of multiple prosecutions. They also exist where for any reason the state statute being enforced is unconstitutional on its face.

401 U.S. at 59.[10]

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[10] In the companion case Perez v. Ledesma, 1971, 401 U.S. 82, 85, 91 S.Ct. 674, 27 L.Ed.2d 701, 705, Mr. Justice Black, writing for the majority, said:

> Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate. See Younger v. Harris, supra; Ex parte Young, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908). There is nothing in the record before us to suggest that Louisiana officials undertook these prosecutions other than in a good-faith attempt to enforce the State's criminal laws.

This Court has previously discussed this question. In Duncan v. Perez, 5 Cir. 1971, 445 F.2d 557, 559-560, we said:

> We read Younger v. Harris to hold that an individual is not entitled to federal injunctive relief against a state prosecution which has been instituted by state officials in good faith unless irreparable injury to the state court defendant (as was shown in Dombrowski v. Pfister, 1965, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22) can be established. On the other hand, should the state court defendant be able to establish that the state prosecution has been instituted in bad faith *and for purposes of harassment* — as put by the concurring opinion Brennan for himself and Justices White in Younger v. Harris of Mr. Justice and Marshall, "official lawlessness" — irreparable injury need not be shown provided there is present a basis for federal jurisdiction, e.g. Title 28, U.S.C., Sec. 1343 and Title 42 U.S.C., Sec. 1983.

In the present case, the district court found that "the perjury charge was brought in bad faith and for purposes of harassment". 328 F.Supp. at 400. That finding is not "clearly erroneous". F.R.Civ.P. 52(a). *See Duncan v. Perez*, 5 Cir. 1971, 445 F.2d 557, 560. *See also Taylor v. City of Selma*, 337 F.Supp. 1191 (S.D.Ala. 1971). Both were post-*Younger* cases. The finding of a bad faith prosecution establishes irreparable injury both great and immediate for purposes of the comity restraints discussed in *Younger*. We conclude that Younger presents no bar to the issuance of an injunction.[11]

The decision of the district court enjoining Garrison from further prosecution of the pending state perjury proceeding against Shaw is AFFIRMED.[12]

See also Hobbs v. Thompson, 5 Cir. 1971, 448 F.2d 456; LeFlore v. Robinson, 5 Cir. 1971, 446 F.2d 715 (Goldberg, J. concurring).

[11]*Younger* and its companion cases note that the threat of "repeated prosecutions", 401 U.S. at 49, may fulfill the "special circumstances" requirement. A showing of such a threat, while one alternative path to federal injunctive relief, is not necessary where bad faith or harassment is established.

In addition, the Court stated in *Younger* that "the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution". 401 U.S. at 46. When the federal right sought to be protected is the right not to be subjected to a bad faith prosecution or a prosecution brought for purposes of harassment, the right cannot be vindicated by undergoing the prosecution.

[12]Garrison argues that the "bias and prejudice" of the trial judge require reversal. This contention is totally without merit.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

Clay L. SHAW

v.

Jim GARRISON, Individually and as District Attorney for the Parish of Orleans, State of Louisiana.

Civ. A. No. 71-125.

United States District Court,
E. D. Louisiana,
New Orleans Division.

May 27, 1971.

Action by defendant in pending state criminal prosecution to enjoin and restrain state prosecutor from further prosecution of the case. The District Court, Christenberry, J., held that where state perjury prosecution was instituted in bad faith by state prosecutor, the defendant in the state prosecution had suffered irreparable harm and would be subject to continuing harassment and multiple prosecutions with likelihood that harassment and prosecution would continue in the future, state prosecutor would be permanently enjoined from further prosecution of the action.

Order in accordance with opinion.

1. Injunction ⇐118(3, 4)

Allegations by defendant in pending state prosecution for perjury that the prosecution had been instituted by state district attorney in bad faith and for purpose of harassment and that the state proceeding was second of series of multiple prosecutions to which defendant had been and would be subjected stated basis for injunction against continued prose-

cution, if proven. 28 U.S.C.A. § 1343(3, 4); 42 U.S.C.A. § 1983.

2. Injunction ⇐128

Defendant in pending state prosecution had burden to prove by preponderance of the evidence the existence of exceptional and unusual circumstances that would justify federal district court in enjoining continued prosecution of the state court proceeding.

3. Injunction ⇐128

When prima facie case of existence of exceptional and unusual circumstances is presented by defendant in pending state criminal prosecution, burden shifts to the prosecution to present evidence to rebut the prima facie case for injunction against further prosecution.

4. Injunction ⇐128

Evidence in action by defendant in state court proceeding to enjoin further prosecution established that state prosecutor undertook his investigation of the defendant's purported participation in conspiracy to assassinate the president of the United States with the specific intent to deprive the defendant of his rights under the First, Fifth, and Fourteenth Amendments. U.S.C.A.Const. Amends. 1, 5, 14; 42 U.S.C.A. § 1983.

5. Civil Rights ⇐1

Under the Civil Rights Act of 1871, a defendant can be held responsible for the natural consequences of his actions which result in deprivation of constitutional rights. 42 U.S.C.A. § 1983.

6. Injunction ⇐128

Evidence established that pending state prosecution for perjury was instituted by state prosecutor in bad faith and that such bad faith constituted irreparable injury to the defendant in the state prosecution which was great and immediate. U.S.C.A.Const. Amends. 1, 5, 14; 42 U.S.C.A. § 1983.

7. Courts ⇐508(1)

Statute providing that a court of United States may not grant an injunction to stay proceeding in state court except if expressly authorized by act of congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment, is not jurisdictional, but rather is legislative enactment of judicial doctrine of comity. 28 U.S.C.A. § 2283.

8. Courts ⇐508(2)

Statute governing civil actions for deprivation of civil rights created exception to statute which prohibited injunctions against pending state court prosecutions. 28 U.S.C.A. § 2283; 42 U.S.C.A. § 1983.

9. Courts ⇐508(7)

Where state perjury prosecution was instituted in bad faith by state prosecutor, the defendant in the state prosecution had suffered irreparable harm and would be subject to continuing harassment and multiple prosecutions with likelihood that harassment and prosecution would continue in the future, state prosecutor would be permanently enjoined from further prosecution of the action. 28 U.S.C.A. § 2283; 42 U.S.C.A. § 1983.

10. Courts ⇐508(2)

While all civil rights suits may constitute express exceptions to the prohibitions contained in statute pertaining to injunction against prosecution of state court proceedings, only those civil rights suits which contain exceptional circumstances which constitute exceptions to the judicial doctrine of comity are proper subjects for equitable relief. 28 U.S.C.A. § 2283; 42 U.S.C.A. § 1983.

Edward F. Wegmann, William J. Wegmann, F. Irvin Dymond, Salvadore Panzeca, New Orleans, La., for plaintiff.

John P. Volz, Andrew J. Sciambra, William R. Alford, Jr., New Orleans, La., for defendant.

CHRISTENBERRY, District Judge.

Clay L. Shaw, plaintiff, has filed a complaint seeking to enjoin and restrain defendant, Jim Garrison, District Attorney for the Parish of Orleans, State of Louisiana, and members of his staff, from further prosecution of a pending

criminal case entitled "State of Louisiana vs. Clay L. Shaw," No. 208-[illegible], Section "A" of the Criminal District Court of the Parish of Orleans, State of Louisiana. Shaw also seeks to restrain the defendant and his assistants from filing and prosecuting any additional criminal charges arising out of or incidental to the allegations of his complaint. In his complaint plaintiff charges that Garrison conspired with Willard E. Robertson, Joseph M. Rault, Jr. and Cecil M. [illegible], members of an organization known as Truth or Consequences to deprive him of his constitutional rights.

Plaintiff invokes the jurisdiction of this court pursuant to Title 28 U.S.C. § 1343(3) (4) and Title 42 U.S.C. § 1983 and § 1985 as well as under the Constitution of the United States. He alleges that he has suffered and will suffer irreparable injury due to the defendant's continuing misuse and abuse of the prosecutorial powers vested in defendant by virtue of his office as District Attorney for the Parish of Orleans. Plaintiff contends that Garrison has continued to use in bad faith the state's legal machinery in the prosecution of innocent citizens, such as plaintiff, with no hope of success in obtaining a conviction.

On January 18, 1971, the trial date of the state case, the plaintiff applied to this court for a temporary restraining order. This court denied the application because of the imminence of the trial and the *ex parte* nature of the temporary restraining order. The attorneys for the plaintiff then applied to the United States Court of Appeals for the Fifth Circuit for emergency relief. After a conference with this court a panel of judges of the Fifth Circuit Court of Appeals entered an order directing this court to hold a hearing on the plaintiff's application for injunctive relief. The state case, meanwhile, was continued to January 20th. Upon remand, and after a conference with counsel for both parties present, this court entered a temporary restraining order enjoining the defendant from taking any further action in the prosecution of the state case, pending a hearing on the preliminary injunction which was set for January 25th.

At the hearing, which took three days, numerous witnesses were heard and fifty-five exhibits were offered and filed into evidence by the plaintiff. Both sides were given time to file and have filed briefs.

The facts that give rise to this proceeding result from the defendant Garrison's investigation of the assassination of President John F. Kennedy. To characterise these facts as unique and bizarre is no exaggeration. The plaintiff Shaw has been tried and acquitted on the heinous charge that he conspired to assassinate President Kennedy. Subsequent to his acquittal, the defendant Garrison immediately, and without any witnesses other than those he used at the trial, charged Shaw with perjury. It is this pending state proceeding that the plaintiff seeks to enjoin. Garrison contends that during the course of the conspiracy trial, Shaw, who took the stand in his own defense, perjured himself when he denied having known either David Ferrie or Lee Harvey Oswald, with whom he was alleged to have conspired to assassinate the President.

At the outset, it is to be noted that this court has had the benefit of the most recent expressions of the United States Supreme Court dealing with federal intervention in pending state criminal prosecutions: Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Byrne v. Karalexis, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971); Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971). These cases reaffirm "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." Younger v. Harris, 401 U.S. at 41, 91 S.Ct. at 749. This court must determine whether the facts of this case fall within the ambit of the "special circumstances" exception expressed in

Younger. Discussing the nature of these circumstances the Court in *Younger* stated:

"In all of these cases the Court stressed the importance of showing irreparable injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is 'both great and immediate.' *Fenner, supra* [Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927 (1926)]. Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, *the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution*. See, *e. g.*, Ex parte Young, *supra*, 209 U.S. [123] at 145–147, 28 S.Ct. [441] at 447–449 [52 L.Ed. 714]." 401 U.S. at 46, 91 S.Ct. at 751 (Emphasis supplied).

Further, in denying injunctive relief to Harris the Court stated:

"It is against the background of these principles that we must judge the propriety of an injunction under the circumstances of the present case. Here a proceeding was already pending in the state court, affording Harris an opportunity to raise his constitutional claims. *There is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected.* In other words, the injury that Harris faces is solely 'that incidental to every criminal proceeding brought lawfully and in good faith,' *Douglas* [Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943)], therefore under the settled doctrine have already described he is not entitled to equitable relief 'even if statutes are unconstitutional.' [Watson v. Buck, 313 U.S. 387, S.Ct. 962, 85 L.Ed. 1416 (1941) 91 S.Ct. at 753, 401 U.S. at 49 (phasis supplied).

[1] Shaw in his complaint alleges that the pending state prosecution been instituted by Garrison in bad and for the purpose of harassment. contends that this state proceeding the second of a series of multiple prosecutions to which he has been and will subjected. These allegations state a basis for injunctive relief, proven. See Buie v. Pigott, 439 F.2d (5th CCA 1971). They meet the "special circumstances" requirements *Younger*. The question is whether facts as adduced at the hearing support the allegations. To resolve this question a review of those facts is necessary

On November 22, 1963, President John F. Kennedy was assassinated in Dallas, Texas. Immediately thereafter, Lee Harvey Oswald was accused of committing the crime. Unfortunately, less than forty-eight hours after the President's death, Oswald was slain. The defendant Garrison testified that his office first participated in an investigation of the President's assassination when it learned that Oswald had spent the prior summer in New Orleans. A short investigation by his office resulted in the arrest of David Ferrie who was turned over to the Federal Bureau of Investigation for questioning.[1] It was not until some years later, in November of 1966, that the defendant decided that further investigation by him was necessary. This decision came after an extensive investigation by a commission, the Warren Commission, created on November 29, 1963 pursuant to Executive Order No. 11130 by President Lyndon B. Johnson "to

[1] In his book, *A Heritage of Stone*, Shaw Exhibit No. 21, Garrison states his office had been informed that Oswald and Ferrie were "associated together in the Civil Air Patrol" in New Orleans.

[illegible] evaluate and report upon the facts relating to the assassination of the late President John F. Kennedy and the subsequent violent death of the man charged with the assassination." The testimony of approximately 550 witnesses before the Commission and more than [illegible] exhibits received into evidence make up the contents of 26 bound volumes. However, despite this exhaustive probe, Garrison, according to his testimony, concluded that "the Federal Government had not been looking into it heavily, and that it had been a fake investigation * * *" so in November, [illegible], he decided that his office would undertake what he termed "a serious investigation."

At this point, a serious question concerning the basis for Garrison's decision arises. Apparently, his jurisdiction was based on Oswald's activities in New Orleans in the summer of 1963.[1] However, it is strange indeed that, nearly three years after the assassination, Garrison could decide to undertake an investigation of such gravity merely because he disagreed with the findings of the Warren Commission and Oswald had spent some time in New Orleans. The defendant did not testify as to what evidentiary basis led him to believe that further investigation of the assassination of the President was needed.

The testimony of William A. Gurvich corroborated the defendant's statement that the assassination investigation began in the latter part of 1966. Gurvich, an experienced investigator whom this court believed, testified that Garrison solicited his help to conduct the investigation on or about December 22, 1966. Gurvich subsequently accepted and participated in the probe until June 27, [illegible] when he resigned. He stated that he resigned because he believed the investigation was a "fraudulent, criminal rip."

According to Garrison, Shaw was first interviewed in his office in December, [illegible]. Garrison testified that at that time Shaw was not considered a suspect by the defendant and was not advised of his constitutional rights, nor was he told of his right to counsel. Just how the plaintiff was first selected to be interviewed by the defendant when he was not a suspect is another unanswered question in this case. The defendant offered no evidence to show any basis or cause for his office's interrogation of the plaintiff concerning such a shocking crime. His failure to offer any explanation leaves this court with but one conclusion, namely, that there was no factual basis for questioning Shaw concerning the assassination. This conclusion is supported by further facts that are discussed hereafter.

On March 1, 1967, plaintiff was arrested by the defendant and charged with "participating in a conspiracy to murder John F. Kennedy." Two events prior to his arrest are of significance. One is the emergence of a witness named Perry Raymond Russo. The other is the formation of a group which called itself "Truth or Consequences."

Perry Raymond Russo

On February 20, 1967, David Ferrie, the defendant Garrison's link between Oswald and a supposed New Orleans based conspiracy to assassinate the President, died. Shortly thereafter Andrew J. Sciambra, an assistant district attorney in the defendant's office, went to Baton Rouge to interview Perry Raymond Russo, as a result of a newspaper article in which Russo made several statements concerning Ferrie. Sciambra testified this was on or about February 25, 1967, four days prior to the date of the plaintiff's arrest. Garrison testified this was the first time his office became aware of Russo. Sciambra wrote two memoranda of the Baton Rouge meeting with Russo, one of which was introduced into evidence. In the memorandum filed into evidence, no mention is made of any conspiratorial meeting to assassinate the President. The

1. The defendant states this basis in his book.

following Monday, February 27th, two days before Shaw's arrest, Russo came to New Orleans. At the instruction of the defendant, he was subjected to Sodium Pentothal by the late Dr. Nicholas Chetta, who was the Coroner for the Parish of Orleans, and hypnosis by Dr. Esmond Fatter. The defendant stated the purpose of these strange procedures was "to obtain a degree of corroboration" of what Russo had related to Sciambra in Baton Rouge of a New Orleans conspiratorial meeting between the plaintiff, Ferrie and Oswald. It should be borne in mind that the memorandum which Sciambra wrote on his return from Baton Rouge did not mention any such meeting. However, substantial doubts are raised regarding the validity and objectivity of the state's case when a prosecuting attorney resorts to the use of such extraordinary tactics as were employed by Garrison on Russo. A fair inference to be drawn is that these *ex parte* procedures were used to implant into Russo's mind a story implicating the plaintiff in an alleged conspiracy plot. This could have been accomplished by post-hypnotic suggestion. This inference is supported by the fact that Garrison immediately moved to arrest and charge Shaw based solely on Russo's questionable, vague story. Such hasty action on the part of the defendant without further investigation and without submitting the matter, at that time, to the grand jury demonstrates ulterior motives.

Judge James L. Alcock, who was on the defendant's staff, and was the chief prosecuting attorney at the Shaw conspiracy trial, testified that the only witness against Shaw at the time of his arrest was Russo. Garrison did not rebut this testimony, even when this court confronted him with it. He refused to answer the question when it was propounded to him by plaintiff's counsel and this court.

[2, 3] This is a very pertinent point in this case. The burden of proof is, of course, upon the plaintiff Shaw to prove by a preponderance of the evidence the existence of exceptional and unusual circumstances that would justify this court's intervention. Younger v. Harris, *supra*. When the plaintiff's evidence constitutes a prima facie case, the burden is on the defendant of going forward with any evidence to rebut the plaintiff's case. *Cf.* Bush v. Kaim, 297 F. Supp. 151, 161 (N.D.Ohio 1969); Mann v. Davis, 213 F.Supp. 577, 584 (E.D.Va. 1962), aff'd, 377 U.S. 678, 84 S.Ct. 1461, 12 L.Ed.2d 609 (1964). In this case the defendant Garrison offered no proof, apparently relying on the supposed inability of Shaw to sustain his burden and that even if Shaw did, he would not be entitled to any relief by this court. In those instances where the plaintiff proved certain facts by a preponderance of the credible evidence, and the defendant failed to rebut those facts either on cross-examination or by offering contrary evidence, this court has accepted those facts as true.

The lack of substance of Russo's story is emphasized by several events which occurred subsequent to Shaw's arrest. At Shaw's conspiracy trial, Russo's testimony differed materially from that which he gave at a preliminary hearing prior to the trial. The most salient change in his testimony was his inability at the trial to identify the plaintiff as having been present at an alleged conspiratorial meeting in New Orleans. At the preliminary hearing he stated unequivocally that the plaintiff Shaw was present. This change was no surprise to Garrison as he had been told previously by Lieutenant Edward A. O'Donnell of the New Orleans Police Department that Russo could not identify Shaw as having been a participant in an alleged conspiratorial meeting.

Lt. O'Donnell has been a member of the New Orleans Police Department for 19 years. He impressed this court with the candor with which he testified. In 1967, he was the department's polygrapher and in June, 1967, at Garrison's request, he attempted to give Russo a lie detector test. It was not successful. However, O'Donnell stated he took the

machine's attachment from Russo's body and continued on with the interview. According to O'Donnell, Russo told him that he did not know if Shaw was at David Ferrie's apartment the night of the alleged meeting to plot the assassination. Russo stated that if he were pressed for an answer, he would have to say that Shaw was not present. He further stated to O'Donnell that "he was under a great deal of pressure and that he was sorry he ever got involved in this mess." O'Donnell testified that he gave Garrison both an oral and written account of his interview with Russo. The written report was filed into evidence in this case by the plaintiff. O'Donnell said Garrison became enraged when he made his report and insinuated that O'Donnell had "sold out to the press or * * * to someone." Garrison stated in his testimony that he questioned the veracity of O'Donnell's report. Yet this witness was subject to cross-examination at the hearing and nothing was adduced to shake his testimony or impeach his credibility. Moreover, it is significant that O'Donnell presently conducts polygraph tests for the defendant's office, which tests are used and acted on by members of the defendant's staff.

The defendant Garrison did not make available to the plaintiff's counsel the report of Lt. O'Donnell. Instead, he withheld it despite the fact that its subject matter pertained directly to statements that were pertinent to the credibility of Russo, the only witness upon whose story Shaw had been arrested.

The defendant testified that in 1967 he believed Russo's story that the plaintiff was present at the alleged conspiratorial meeting and that he still believes his story. Apparently, Russo himself does not share this belief. After having testified previously both at a preliminary hearing and at the conspiracy trial in this court, Russo, at the hearing in this court, invoked the protection afforded by the Fifth Amendment to the United States Constitution, and refused to testify when asked the precise question he had previously answered in the state proceedings. Normally no inference can be drawn when one invokes a right secured to him by the Constitution. However, in the circumstances of this case this court believes that it can and it does draw the narrow inference from Russo's action, that even today, he at least has substantial doubts as to the truthfulness of the testimony he gave in state court.

It would appear that the unusual nature of Russo's story combined with the fact that Russo had come to Garrison's attention as the result of Russo's public statements to the press, should have created some skepticism on the part of the defendant, if he had been acting in good faith. Instead, he chose to ignore the absence from Sciambra's memorandum of mention of the alleged meeting. He resorted to the use of drugs and hypnosis on Russo, purportedly to "corroborate," but more likely to concoct his story. Garrison moved with unexplained haste to arrest and charge Shaw based solely on that story. When Lt. O'Donnell reported to him, Garrison ignored and suppressed the contents of that report which were unfavorable to his case against Shaw. All these actions considered with the subsequent doubtfulness on the part of Russo as a witness show clearly that the defendant Garrison did not act in good faith regarding Russo's story. Garrison was aware of Russo's unreliability from Sciambra's first interview. Yet he arrested, charged, and prosecuted Shaw once and now has again charged him for an offense stemming from Russo's story. Garrison's use of Russo is but one of several factors that reveal his *mala fides* in this case. "Truth or Consequences" is another.

Truth or Consequences

At the hearing, it was determined that the defendant's office spent more than $99,000 while conducting its probe of the assassination and Shaw. Approximately $25,000 of this amount came from the Fines and Fees Account of defendant's office. This account represents monies that are received from bond forfeitures and fines and are used by Garrison to

defray expenses of his office. In order to expend these funds, a motion and order must be submitted to a state judge for his signature. After the judge signs it, a check is drawn to pay the expense incurred. A copy of all motions for disbursements from the account is kept by the defendant's office and the account is subject to a yearly audit. Nearly $70,000 of the $99,000 amount came from an account denominated the J. G. Safi Account. This was a separate account, not subject to audit, set up by the defendant to be used for the expenses of the investigation. The defendant testified that "virtually all of this money you are talking about" concerns investigations subsequent to the one conducted in Mr. Shaw's case. This statement is not correct when viewed in the factual context of this case. As stated above, Shaw was arrested on the basis of the statement of one witness. The investigation followed the arrest and was for the purpose of making the charge against Shaw stick. At his conspiracy trial, over forty witnesses were called by the state. Judge Alcock, the state's chief prosecuting attorney at the conspiracy trial, testified in this court that, to his knowledge, most of the state's witnesses were secured after Shaw's arrest. The record in this case reveals that most of the defendant's investigative expenses were incurred in the period between Shaw's arrest and his trial. The evidence is overwhelming that these funds were used in preparation for Shaw's conspiracy trial.

[4, 5] The defendant throughout these proceedings has attempted to distinguish between the Shaw case and the investigation of President Kennedy's assassination. He sought to differentiate between the two by testifying that his assassination probe and the expenses incurred therein had "nothing really to do with Mr. Shaw or the original case against Mr. Shaw, or the forthcoming case against Mr. Shaw." The incongruity of this statement is apparent and appalling. No other arrest and trial has resulted from the investigation but that of Clay Shaw. Without Clay Shaw, the defendant had no jurisdictional ground on which to justify his New Orleans based investigation of the assassination. Shaw is an integral part of the probe as evidenced by the fact that only he has been affected by the investigation. Without Shaw, there could be no probe. Garrison states he was interested in the "forces responsible for the assassination rather than individuals." Notwithstanding this statement by Garrison, this court, considering all of the evidence, finds that Garrison undertook his baseless investigation with the specific intent to deprive Shaw of his rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States. Moreover, in an action based on Title 42 U.S.C. § 1983, specific intent is not a necessary element. See Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); Whirl v. Kern, 407 F.2d 781 (5th CCA 1969), cert. den., 396 U.S. 901, 90 S.Ct. 210, 24 L.Ed.2d 177 (1969). A defendant can be held responsible under the Civil Rights Act of 1871 "for the natural consequences of his actions." Monroe v. Pape, *supra*, 365 U.S. at 187, 81 S.Ct. at 484. To separate the investigation of Shaw from the investigation generally would be fallacious and this court does not make that distinction. For purposes of this case, the investigation of Shaw and the assassination probe by the defendant are viewed as being synonymous by this court. This is especially significant in appraising the facts concerning the operations of the so-called "Truth or Consequences" group.

"Truth or Consequences" was created in the latter part of February, 1967, shortly before Shaw's arrest on March 1, 1967. Three men, Willard E. Robertson, Joseph M. Rault, Jr. and Cecil M. Shilstone, formed this group to financially support Garrison's investigation. They not only contributed their own funds but solicited contributions from others and fund-raising breakfasts and other meetings were held to which prospective contributors were invited. Garrison attended and spoke at these meetings. Ra

stated the group's purpose was to provide Garrison with private funds to conduct his assassination probe. According to Shilstone, the idea of using private funds was to allow Garrison to avoid accounting publicly for his expenditures in conducting the investigation. Nearly all of the funds contributed to "Truth or Consequences" came after the arrest of the plaintiff Shaw. No conditions were imposed on Garrison's use of these funds except that they be expended in the assassination probe.

It is significant that these individuals all testified that they did not know or wish to know how Garrison spent these funds. They did not require Garrison to give any accounting of the funds he used and he could draw checks at will on the J. C. Safi Account,[3] the Truth or Consequences account and the Garrison Fund account to which the Truth or Consequences account was later transferred at the request of Robertson.

Robertson stated that he personally borrowed $30,000 on two notes from the Bank of New Orleans to contribute to the fund. This money was lent to him on his personal credit and he is personally liable for it. Additionally, he has been paying interest on this debt. Robertson stated that he and Garrison were close personal friends. He said he gave Garrison the money with the understanding that Garrison would eventually repay him. Robertson stated, as did Rault, that this money was to be used in Garrison's investigation of the assassination, not in the prosecution of Clay Shaw. Yet, it was never explained what prompted these three individuals, one an attorney, in late February to believe that the District Attorney for Orleans Parish should have a reason to investigate the assassination which occurred in Dallas, Texas. All testified that they did not know that Garrison suspected Shaw when they formed their organization. However, it is clear that the bulk of the monies contributed for investigative use by the defendant came during the period after Shaw's arrest and prior to his trial. Robertson's notes at the bank are dated November 9, 1967 and January 17, 1968. Shilstone testified that of the $1200 he contributed, $1000 was given on August 11, 1967. Rault managed the fund and wrote numerous checks payable to Garrison and members of Garrison's staff at their request. Most of these checks were written after Shaw's arrest but before his trial. Finally, it is important to note that no monies were contributed or used after the Shaw trial. All of these facts are indicative of the motives of Garrison and these three contributors. When Shaw was arrested the money came in; when he was acquitted, it stopped. The inference that these three persons were aiding Garrison in the prosecution of Shaw is further supported by the fact that Robertson employed in his automobile business a state's witness, Roger Craig from Dallas, Texas, during the course of the Shaw conspiracy trial. After the trial Craig went back to Dallas. Robertson professed to believe that it was merely a coincidence that Craig applied to him for employment and testified he could not remember whether the employment began before or after Craig testified.

The evidence is clear that Garrison was in bad faith in using these funds to prosecute Clay Shaw. Rault frankly testified that he expected results for the money contributed by him. Doubtless this is true of the other two, Robertson and Shilstone. The perjury charge against Shaw is part of Garrison's effort to produce such results.

Perhaps of all the evidence presented at the hearing, that concerning Shaw's arrest and his subsequent prosecution on the conspiracy charge is the most demonstrative of the defendant's bad faith in this case.

3. J. C. Safi Account was the name given to an account in the Bank of Louisiana in New Orleans to describe the Jim Garrison account—Special Account for Investigation.

As stated above, Shaw was first interviewed in the defendant's office in December, 1966. At 1:00 P.M. on March 1, 1967, Shaw appeared voluntarily at the defendant's office. Shaw testified that this appearance was at the request of Garrison's office after Shaw had called to verify a report that a subpoena had been issued compelling him to appear at that office. After waiting an hour or so, Shaw said he was interrogated by Sciambra and Louis Ivon, a police officer assigned to the defendant's office. Ivon was chief investigator for the District Attorney at that time. Neither Sciambra nor Ivon advised the plaintiff of his constitutional rights before commencing the interrogation. Shaw testified that after a period of interrogation, he was told that he would be required to take a lie detector test. He was also told that if he refused, he would be charged with conspiracy to murder the President of the United States. Refusing to take the test and demanding an attorney, Shaw was given the opportunity to call his lawyers. Ivon testified he did not know that Shaw was going to be arrested when the interrogation was taking place, but rather he learned of this fact only later in the day when Garrison instructed him to make the arrest.

Garrison carefully set the stage for Shaw's arrest, which took place at approximately 5:30 P.M., four and a half hours after Shaw voluntarily appeared in Garrison's office. During this time, a representative of Life Magazine photographed Shaw through a two-way mirror unbeknownst to him. The hallway outside the defendant's office on the second floor of the New Orleans Criminal Courts Building had mysteriously become congested with newsmen, photographers, television camera crews, and members of the general public. Shaw was led handcuffed into the hallway, where he was shoved and pushed through the crowd to reach an elevator leading to the basement of the building and then to Central Lockup. All of this appeared on television. Shaw could have been taken down in a private elevator located in Garrison's office, but this would not have afforded the publicity Garrison was obviously seeking. Shaw's arrest and the manner in which it was effected was outrageous and inexcusable. The only conclusion that can be drawn from Garrison's actions is that he intentionally staged the arrest for his own purposes, with complete disregard for the rights of Clay Shaw.

The defendant's total disregard of Shaw's rights is accentuated by his pre-trial conduct in preparing for the conspiracy trial. The evidence shows that Garrison on several occasions held press conferences or issued press releases during the pre-trial period. On one occasion, Garrison admitted that he issued a statement to the press with a letter attached which he had written to a national newspaper, *The National Observer*. Garrison stated the letter was a complaint he made to the newspaper regarding an article about Shaw. At the very instant Garrison was issuing the press release, Alcock, his first assistant, was arguing in state court that Shaw and his attorneys were not entitled to the letter attached to the release. When confronted with this inconsistency, Garrison stated, "I suppose I was more generous than Mr. Alcock." However, the point is that the object of Garrison's bounty was the news media and not the then defendant, Clay Shaw. This is another of the indicative facts regarding Garrison's bad faith. Coupled with the suppression of Lt. O'Donnell's report of his interview with Russo, discussed above, the action of Garrison in releasing information to the press while denying it to Shaw clearly reveals that the defendant was not prosecuting Shaw in good faith.

The Perjury Charge

[6] On Saturday, March 1, 1969 at 1:00 A.M., a unanimous jury returned a verdict of not guilty in the conspiracy trial. After forty days of trial the jury took only 55 minutes to reach its verdict. On the next working day, Monday, March 3, 1969, the defendant Jim Garrison filed an information personally signed by him

charging Clay Shaw with the crime of perjury. The instant proceeding, of course, grows out of this charge. Prosecuting officials have wide discretion and necessarily so, but the court finds that as in the case of defendant's previous actions with regard to Shaw, the perjury charge was brought in bad faith and for purposes of harassment, being the product of both selective law enforcement and financial interest.

Shaw of course was charged with perjury on the basis of testimony given by him in his own defense at the conspiracy trial. No witness who testified before this court, including Garrison, could give another instance in which a defendant who took the stand and was acquitted was subsequently charged by Mr. Garrison with perjury. This fact standing alone does not evidence bad faith. It does however call for some explanation. Though requested by counsel for defendant and by this court, none was given. No explanation was given even though it was admitted by Mr. Alcock that at the time the perjury charge was filed there were no witnesses available other than those who were available at the conspiracy trial. Mr. Garrison himself refused to answer the question of whether there was any new evidence tending to show perjury on the part of Mr. Shaw. Moreover, the evidence shows that although substantial discrepancies existed in the trial testimony and testimony previously given by state witnesses, Russo and Bundy, the latter a narcotic addict and known by Garrison to be such, no perjury charges have been filed against them.

Coupled with these facts is the fact that Garrison has a significant financial interest in the continued prosecution of Clay Shaw. Garrison's book, *Heritage of Stone*, concerns his investigation of President Kennedy's assassination. Defendant also has a contract to write three additional books. It is obvious that the sale of defendant's book may be promoted by the publicity resulting from the continued prosecution of Clay Shaw. It provides a means whereby defendant himself may profit, and also repay the substantial obligations owed to one of his financial backers. The court finds that this desire for financial gain is among the motives which prompt the continued prosecution of Clay Shaw.

Finally, this court must make another comment concerning the facts of this case. In his book, *Heritage of Stone*, defendant Garrison makes several references to the Dreyfus case. When we consider Garrison's actions toward Shaw it is small wonder that in writing his book that classic example of injustice came to his mind.

Considering all of the evidence adduced at the hearing of this matter the court finds that the pending prosecution was brought in bad faith and that such bad faith constitutes irreparable injury which is great and immediate. The court further finds that this is a case of exceptional and extremely limited circumstances.

Having found bad faith that constitutes irreparable injury which is both "great and immediate" this court finds itself faced with Mr. Justice Stewart's "negative pregnant."[6] Where "exceptional and extremely limited circumstances" are found, is intervention by way of injunction subject to any further

[6] In his concurring opinion in Younger v. Harris, 401 U.S. 37, 56, 91 S.Ct. 746, 755, 27 L.Ed.2d 669, 681 (1971), Mr. Justice Stewart stated:

"The Court confines itself to deciding the policy considerations that in our federal system must prevail when federal courts are asked to interfere with pending state prosecutions. Within this area, we hold that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution.3"

Footnote 3 states:

"3. The negative pregnant in this sentence—that a federal court may, as a matter of policy, intervene when such 'exceptional and extremely limited circumstances' are found—is subject to any further limitations that may be placed on such intervention by 28 U.S.C. § 2283."

limitation that may be placed on such intervention by 28 U.S.C. § 2283?

[7] The origins of 28 U.S.C. § 2283 have been amply traced by several courts[5] and this court does not intend to retrace their steps. Suffice it to say that § 2283 is not jurisdictional,[6] but rather is a legislative enactment of the judicial doctrine of comity.[7] It is also clear that irrespective of additional limitations imposed, § 2283 is at least as broad as the judicially developed doctrine of comity.[8] This is evident from a reading of *Younger*, *supra*, and its companion cases[9] where disposition was based not on the effect of § 2283 independently but rather on the failure to show "exceptional and extremely limited circumstances." If § 2283 is determined to be inapplicable[10] or if it is merely synonymous with the judicially developed doctrine of comity[11] then plaintiff is entitled to injunctive relief as he has amply shown that this case falls squarely within the exception to that doctrine.[12] If § 2283 is applicable[13] and if it is as

5. Atlantic C.L.R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970); Baines v. City of Danville, 337 F.2d 579 (4th CCA 1964), cert. den., Chase v. McCain, 381 U.S. 939, 85 S.Ct. 1772, 14 L.Ed.2d 702 (1965); Sheridan v. Garrison, 415 F.2d 699 (5th CCA 1969), cert. den., 396 U.S. 1040, 90 S.Ct. 685, 24 L.Ed.2d 685 (1970).

6. Smith v. Apple, 264 U.S. 274, 44 S.Ct. 311, 68 L.Ed. 678 (1924); Machesky v. Bizzell, 414 F.2d 283 (5th CCA 1969).

7. Sheridan v. Garrison, 415 F.2d 699 (5th CCA 1969), cert. den., 396 U.S. 1040, 90 S.Ct. 685, 24 L.Ed.2d 685 (1970); Machesky v. Bizzell, 414 F.2d 283 (5th CCA 1969); Baines v. City of Danville, 337 F.2d 579 (4th CCA 1964), cert. den., Chase v. McCain, 381 U.S. 939, 85 S.Ct. 1772, 14 L.Ed.2d 702 (1965).

8. Baines v. City of Danville, 337 F.2d 579 (4th CCA 1964), cert. den., Chase v. McCain, 381 U.S. 939, 85 S.Ct. 1772, 14 L.Ed.2d 702 (1965).

9. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); Byrne v. Karalexis, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 782 (1971); Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971).

10. Leiter Minerals, Inc. v. United States, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957). In *Leiter*, § 2283 was held not to be applicable where the United States is a party. There the Court reasoned that the application of § 2283 would frustrate "superior federal interests." See also Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d CCA 1966), involving the use of injunctive powers pursuant to the Securities & Exchange Act. Under the rationale of *Leiter*, *supra*, it is doubtful that the rights plaintiff asserts here could be characterized as being of "superior federal interest" so as to make § 2283 altogether inapplicable.

11. It is obvious that several courts have taken this view. That is to say that § 2283 is no more stringent than the limitations imposed by the general principles of comity. In these cases § 2283 was deemed not to be an obstacle to the granting of relief once irreparable injury is shown. This was so even though pending criminal prosecutions were enjoined. Duncan v. Perez, 321 F.Supp. 181 (E.D.La.1970); Carmichael v. Allen, 267 F.Supp. 963 (N.D.Ga.1967).

12. Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943). *Douglas*, since it did not involve a pending prosecution, was not concerned with the effect, if any, of § 2283. It remains, however, one of the clearest statements of the requirements which must be met under the judicially fashioned doctrine of comity. *Younger* shows that the requirements of *Douglas* are also to be applied in cases where § 2283 is involved. See also language quoted from Atlantic C.L.R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970), footnote 14, *infra*, where Mr. Justice Black states that an injunction must be "otherwise proper under general equitable principles" even if based on one of the specific statutory exceptions to § 2283.

13. It must be assumed that a pending criminal action is a "proceeding" within the intendment of § 2283. Dombrowski v. Pfister, 380 U.S. 479, 484, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). In *Dombrowski*, the court clearly pointed out the distinction between criminal prosecutions which are merely threatened and those which are actually pending.

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...ed that the holding of Atlantic C. L. ... R. Co. v. Brotherhood of Locomotive ...gineers, 398 U.S. 281, 90 S.Ct. 1739, ... L.Ed.2d 234 (1970) is still viable,[14] ...., the anti-injunction statute is abso... meaning no judicially created excep... are to be allowed; then the plain... showing of "exceptional and unusu... circumstances" is not sufficient in ... of itself to warrant the granting of ...lief absent the additional showing that ...lief is based on one of the expressly ...merated exceptions to § 2283.[15] It ... obvious under the facts of this case, ...at the only feasible statutory exception ... one which makes § 2283 inapplicable ...here "expressly authorized by Act of ...Congress." This of course brings the court to a consideration of the problem of whether § 1983 should be considered an express exception to § 2283. As in the case of § 2283, this issue has been the object of much judicial comment.[16] The Supreme Court has on several occasions noted the existence of the issue but declined to decide it.[17]

[8] This court feels that it may not fairly and justly avoid this issue and, therefore, for the reasons assigned, determines that § 1983 does constitute an express exception to § 2283.

[9] Initially it should be noted that this court is aware of the warning in *Stefanelli*[18] and the important policy

14. The language in *Atlantic C. L. R. R.*, *supra*, is explicit. Mr. Justice Black stated as follows:

"The respondents here have intimated that the Act only establishes a 'principle of comity,' not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention. In 1955 when this Court interpreted this statute, it stated: 'This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions.' *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, 515-516 [75 S.Ct. 452, 455, 99 L.Ed.600] (1955). Since that time Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction." 398 U.S. at 286-287, 90 S.Ct. at 1742.

15. 28 U.S.C. § 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

16. Cooper v. Hutchinson, 184 F.2d 119 (3d CCA 1950) and its progeny, DeVita v. Sills, 422 F.2d 1172 (3d CCA 1970), and National Land & Investment Company v. Specter, 425 F.2d 91 (3d CCA 1970) express the Third Circuit's view that the Civil Rights Act of 1871, 42 U.S.C. § 1983, comes within the expressly authorized exception to the anti-injunction provisions of § 2283. The Fourth, Sixth, and Seventh Circuits take the opposite view. Baines v. City of Danville, 337 F.2d 579 (4th CCA 1964), cert. den., Chase v. McCain, 381 U.S. 939, 85 S.Ct. 1772, 14 L.Ed.2d 702 (1965); Sexton v. Barry, 338 F.2d 220 (6th CCA), cert. den., 382 U.S. 870, 77 S.Ct. 94, 1 L.Ed. 2d 76 (1960); Smith v. Village of Lansing, 241 F.2d 856 (7th CCA 1957). The Fifth Circuit has declined to answer the question. Machesky v. Bizzell, 414 F.2d 283, 287 (5th CCA 1969).

17. Cameron v. Johnson, 390 U.S. 611, 613-614, n. 3, 88 S.Ct. 1335, 20 L.Ed. 2d 182 (1968); Dombrowski v. Pfister, 380 U.S. 479, 484, n. 2, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

18. Stefanelli v. Minard, 342 U.S. 117, 122-124, 72 S.Ct. 118, 96 L.Ed. 138 (1951):

"If these considerations limit federal courts in restraining State prosecutions merely threatened, how much more cogent are they to prevent federal interference with proceedings once begun. If the federal equity power must refrain from staying State prosecutions

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considerations which underlie it. It is the opinion of this court however that such policy considerations are inapplicable under the facts of this case. This court is not dealing with a single good-faith criminal prosecution wherein allegations of unconstitutional procedures are made. This court is dealing with a case of continuing harassment and multiple prosecutions, with the likelihood that such harassment and prosecution will continue in the future, unless abated by direct federal court intervention. Herein lies the unique nature of this case and the resulting impotency of traditional avenues of relief. If plaintiff is forced to stand trial for perjury, takes the stand and is acquitted, this court has no doubt but that plaintiff will be charged anew on the basis of statements made by him from the witness stand. A request for relief in this subsequent prosecution would be met with the same arguments put forth by the defendant in the instant proceeding and so on *ad infinitum*. Surely at some point plaintiff's precious constitutional rights must be vindicated.

[16] Aside from this consideration, however, is the fact that not every § 1983 suit will pass muster as the basis for federal injunctive relief. A reading of *Younger* clearly shows that whatever this court says concerning § 1983 and its relationship to § 2283, an independent showing of "exceptional circumstances" must be made before a plaintiff may successfully invoke federal injunctive relief.[18] Thus while all § 1983 suits may constitute express exceptions to the prohibitions contained in § 2283, only those § 1983 suits which contain exceptional circumstances, *i. e.*, which constitute exceptions to the judicial doctrine of equity, are the proper subjects for equitable relief. It is the firm conviction of this court that the granting of equitable relief here will neither be an "insupportable disruption" of nor a "flanking movement against" the administration of criminal justice by the state.

Whatever else may be said about § 1983 and its antecedents under the Civil Rights Act of 1871, one fact is eminently clear—they were designed to prohibit any state from depriving a citizen of his constitutional rights. To this end Congress gave to the courts the power to grant appropriate relief, including relief which is equitable in nature. It goes without saying that one of the most effective tools that a state or subdivision thereof has with which to deprive a citizen of his rights is its criminal laws and the ability to prosecute thereunder. Unless one is to assume that Congress through the equity grant of § 1983 intended only sham relief (an assumption this court refuses to make) there is every reason to hold that the equitable remedy expressly authorized in 42 U.S.C. § 1983 is within the exception set forth in 28 U.S.C. § 2283. Cooper v. Hutchinson, 184 F.2d 119, 124 (3d CCA 1950). This

outright to try the central question of the validity of the statute on which the prosecution is based, how much more reluctant must it be to intervene piecemeal to try collateral issues.

The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of ... forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution." (Footnotes omitted.)

18. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). See ...

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court holds that § 1983 is within the exception set forth in § 2283.

Considering the evidence and the law, this court is convinced that the plaintiff is entitled to the relief sought. Accordingly, it is ordered that a permanent injunction issue restraining Jim Garrison, District Attorney for the Parish of Orleans, his assistants, employees, agents and all persons in active concert and participation with him from further prosecution of the pending criminal action entitled "State of Louisiana v. Clay L. Shaw," No. 208-260.

Counsel for plaintiff will prepare and present an appropriate injunction. In the interim the temporary restraining order now in effect will be extended for an additional ten days from May 29, 1971, or until such time before then that the permanent injunction is entered.

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APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2422

D. C. Docket No. CA 71-135

CLAY L. SHAW,

Plaintiff-Appellee,

versus

JIM GARRISON, Individually, and as District Attorney for the Parish of Orleans, State of Louisiana,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

July 31, 1972

Issued as Mandate:

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FILED
OCT 16 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-460

CLAY L. SHAW,

Respondent-
Appellee Below,

versus

JIM GARRISON,

Petitioner-
Appellant Below.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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CLAY L. SHAW opposes the petition of JIM GARRISON for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

I.

OPINIONS BELOW

The opinions below are correctly set forth in the Appendix to the petition.

II.

JURISDICTION

The jurisdiction is correctly stated by the petition.

III.

QUESTIONS PRESENTED

The petition does not accurately state the questions presented for review by the Court.

The questions presented by this petition have recently been decided by this Court in *Mitchum vs. Foster*, 407 U.S. 225 (1972), and *Younger vs. Harris*, 401 U.S. 37 (1971) and its companion cases, and *Perez vs. Ledesma*, 401 U.S. 82, (1971).

The questions presented are:

1. The right of a Federal Court to enjoin a pending State Court criminal proceeding where irreparable injury is "both great and immediate." 401 U.S. 46, where the state law is "flagrantly and patently violative of express constitutional prohibitions", 401 U.S. 53, or where there is a showing of "bad faith, harassment or ... other unusual circumstances that would call for equitable relief". 401 U.S. 54.

2. Whether Title 42 U.S.C. 1983 is an express exception to the Anti-Injunction Statute, 28 U.S.C. 2283.

The District Court made extensive and detailed findings of fact. It characterized the facts as "unique and bizarre" and held that "the perjury charge was

brought in bad faith and for purposes of harassment ... such bad faith constitutes irreparable injury which is great and immediate." 328 F.Supp. 400. The Court found as a fact that the "special circumstances" of *Younger* were proven by Shaw and granted injunctive relief prohibiting his prosecution on the perjury charge. The Court had the benefit of this Court's decisions in *Younger vs. Harris* and its companion cases and relied on them extensively.

The District Court likewise decided that Section 1983 does constitute an express exception to Section 2283.

The Appellate Court affirmed the decision of the District Court. It took note of the fact that the decision of the District Court that Section 1983 was an express exception to Section 2283 has now been confirmed by this Court in its decision in *Mitchum vs. Foster*. The Appellate Court found that it was "unnecessary to go beyond the bad-faith nature of the perjury prosecution to affirm the judgment."

Relying on what is an obvious typographical error, the petition attacks the decision of the Appellate Court and accuses it of having a "cavalier attitude" and "lack of independent thought." (Footnote, Page 6) There is no merit to such a charge. The injunction issued by the Trial Court enjoined and prohibited Garrison from prosecuting Shaw for perjury. Obviously there was no perjury trial. These proceedings were initiated by Shaw's application for an injunction enjoining and prohibiting Garrison from prosecuting him for perjury. There was a trial on Shaw's request for a permanent injunction, and it was at this hearing that

Garrison's star witness, Russo, invoked the Fifth Amendment. Applications for certiorari, based upon such frivolous grounds as this are without substance or merit.

No new or serious constitutional question is presented by the petition. The questions presented by the petition, when accurately and correctly stated, have recently been decided by this Court, and this Court's decisions in those cases have been accurately and faithfully adhered to, both by the District Court and the Appellate Court.

IV.

STATUTES INVOLVED

The petition correctly states the statutes involved.

V.

STATEMENT OF THE CASE

Both the District Court and the Appellate Court correctly and accurately stated the case, the course of the proceedings conducted in the Trial Court, and the facts presented for review. Their decisions are set forth verbatim in the appendix to the petition.

The petition does not present an accurate statement of the case. As presented, it is both inaccurate and incomplete.

For example, no mention is made of the fact that Garrison produced no witnesses, and introduced no evi-

dence whatsoever, to contradict or rebut the wealth of evidence presented on behalf of Shaw during three full days of trial in the District Court. No mention is made of the numerous findings of fact by the Trial Court in support of its conclusion that Garrison was acting in bad faith for purposes of harassment only, as a result of which Shaw's constitutional rights were being violated. No mention is made of the fact that Garrison charged Shaw with perjury, on the very first working day, following Shaw's acquittal, after forty-one days of trial, on charges that he conspired with Lee Harvey Oswald to assassinate John F. Kennedy, late President of the United States. The inaccuracies and the incompleteness of the statement of the case as presented by the petition are too numerous to set forth in detail and are best reflected by the opinions below.

VI.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The decision below is clearly correct in holding that where it is alleged and established, as it has been here, that a State Court proceeding is not being conducted for legitimate purposes, but in bad faith for purposes of harassment, as a result of which the citizen will suffer irreparable injury, great and immediate, neither Section 2283, federalism or comity, prevent or prohibit the issuance of an injunction restraining a State Court proceeding. That such is the case was made quite clear by this Court in *Younger vs. Harris* and its companion cases, and in *Mitchum vs. Foster*. In these cases, this Court has made it abundantly clear that

injunctive relief against State Court criminal proceedings is available to the citizen, where it is established that the state official is acting in bad faith, for purposes of harassment only, as a result of which the citizen's constitutional guarantees, regardless of which ones they may be, are being violated, or will be violated unless the federal court does intervene; nor is it essential to injunctive relief for the citizen to show a violation of First Amendment rights. Injunctive relief is available for the protection of any and all constitutional guarantees upon a showing of bad faith, harassment, irreparable injury, great and immediate. These principles were affirmed by this Court in *Mitchum vs. Foster:*

> "In Younger, this Court emphatically reaffirmed "the fundamental policy against federal interference with state criminal prosecutions." 401 U.S. at 46, 91 S.Ct. at 751. It made clear that even "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." 401 U.S. at 54, 91 S.Ct. at 755. At the same time, however, the Court clearly left room for federal injunctive intervention in a pending state court prosecution in certain exceptional circumstances — where irreparable injury is "both great and immediate," 401 U.S. at 46, 91 S.Ct. at 751, where the state law is "flagrantly and patently violative of express constitutional prohibitions," 401 U.S. at 53, 91 S.Ct. at 755, or where there is a showing of "bad faith, harassment, or ... oth-

> er unusual circumstances that would call for equitable relief." 401 U.S. at 54, 91 S.Ct. at 755. In the companion case of Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701, the Court said that "(o)nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate." 401 U.S. at 85, 91 S.Ct. at 677. See also Dyson v. Stein, 401 U.S. 200, 203, 91 S.Ct. 769, 771, 27 L.Ed.2d 781."

The pronouncements of this Court in *Mitchum vs. Foster* are quite clear and precise; they leave no room for interpretation or clarification. This Court has reaffirmed the role of the Federal Courts as the protector of the citizens' federal rights. This Court has now settled the long-pending question as to whether or not 28 U.S.C. 2283 is an absolute bar to injunctions against State Court proceedings.

In holding that Section 1983 is an Act of Congress that falls within the expressly authorized exceptions of Section 2283, Justice Stewart said:

> "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of Section 1983 was to

> interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative or judicial." Ex parte Virginia, 100 U.S. 339, 346, 25 L.Ed 676. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in Section 1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; cf. Truax v. Raich 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131; Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22. For these reasons we conclude that, under the criteria established in our previous decisions construing the anti-injunction statute, Section 1983 is an Act of Congress that falls within the "expressly authorized" exception of that law."

Contrary to the allegations contained in the petition, it is obvious from a reading of the opinions below that those opinions do not conflict with this Court's opinion in *Younger vs. Harris* or *Dombrowski vs. Pfister*, 380 U.S. 479 (1955), and the companion cases to *Younger*. Quite to the contrary, the District Court, after noting that it had the benefit of this Court's decision in *Younger vs. Harris* and its companion cases, stated:

> "This Court must determine whether the facts of this case fall within the ambit of the "special circumstances" exception expressed in Young. 328 F.Supp. 392."

After reviewing the facts and the evidence at length and in great detail, the District Court stated:

> "... this Court considering all of the evidence finds that Garrison undertook his baseless investigation (of the Kennedy assassination) with the specific intent to deprive Shaw of his rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States. Moreover, in an action based on Title 42 U.S. Section 1983, specific intent is not a necessary element. See Monroe vs. Pate 365 U.S. 187, 81 S.Ct. 473, Five L.Ed. Section 492 (1961); Whirl vs. Kern, 407 F.2d 781, 5 Cir. Ct.App. 1969, Certiorara Denied, 396 U.S. 901, 90 S.Ct. 210, 24 L.Ed. 2nd. 177 (1969)."

Again, after reviewing additional facts and evidence at length, the Court concluded:

> "Considering all of the evidence adduced at the hearing of this matter, the Court finds that the pending prosecution was brought in bad faith and that such bad faith constitutes irreparable injury which is great and immediate. The Court finds that this is a case of exceptional and extremely limited circumstances."

The Appellate Court, after reviewing the record, the findings of the District Court, and the applicable law, concluded:

> "In the present case, the District Court found that 'the perjury charge was brought in bad faith and for purposes of harassment.' 328 F. Supp. at 400. That finding is not 'clearly erroneous.' F.R. Civ. P. 52(a). See Duncan vs. Perez, 5th Cir. 1971, 445 F. 2d 557, 560. See also Taylor vs. City of Selma, 337 F. Supp. 1191 (S.D. Ala. 1971). Both were post-Younger cases. The finding of a bad-faith prosecution establishes irreparable injury both great and immediate for purposes of the comity restraints discussed in Younger. We conclude that Younger presents no bar to the issuance of an injunction."

VII.

CONCLUSION

The prosecution of Clay Shaw by Jim Garrison, District Attorney for the Parish of Orleans, State of Louisiana, commenced on March 1, 1967. It was then that Garrison, acting in bad faith, misusing and abusing the legal machinery of the State for his own personal aggrandizement, and without hope of obtaining a valid conviction, personally ordered Shaw arrested, and charged with having conspired with Lee Harvey Oswald and David W. Ferrie to assassinate John F. Kennedy, late President of the United States. After forty-one days of trial, the jury, after deliberating for less than fifty-five minutes, unanimously acquitted Shaw.

On the next working day, Garrison continued his persecution of Shaw. Garrison continued to act in bad faith and to misuse and abuse the legal machinery of the State, for his own personal aggrandizement, and without hope of obtaining a valid conviction, by personally charging Shaw with perjury. Garrison claimed that Shaw lied when he took the stand in his own defense at the conspiracy trial and testified that he did not know, and had never been acquainted with either Lee Harvey Oswald or David W. Ferrie. The continuing harassment of Shaw by Garrison has caused him irreparable injury "both great and immediate". The continuing harassment of Shaw by Garrison has at long last been terminated and ended by the injunction issued by the Trial Court, and affirmed by the Appellate Court. The actions of the courts below under the "special circumstances" of this case are eminently correct in light of this Court's decisions in *Younger vs. Harris* and *Mitchum vs. Foster*. Shaw's federal right to be free from bad faith prosecutions has been preserved and protected. This Court should continue to enforce the protection afforded Shaw by the decisions of the courts below by denying this Application for a Writ of Certiorari.

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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CERTIFICATE

It is certified that copies of the foregoing Answer of Respondent in Opposition were served on Petitioner this date by mailing same to his counsel of record as required by Rule 33-1 of this Court.

New Orleans, Louisiana, October ____, 1972.

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